"That you on 1st September, 1972 at the Police College, Kuala Kubu Bahru, in the district of Ulu Selangor, in the State of Selangor, fraudulently used as genuine a certain document, to wit, the photostat copy of the Malaysia Certificate of Education which you knew at the time you used it to be a forged document, and that you have thereby committed an offence punishable under section 465 and 471 of the Penal Code."

The learned magistrate then adjourned the case to August 20, 1973 for sentence on the first charge and for mention on the second charge. When the case came up on August 20, the learned magistrate proceeded to assess sentence on the first charge. From the finger-print report, the learned magistrate found the accused had no previous criminal record and he also considered the probation report which appeared to be favourable. After considering the plea in mitigation, he bound over the accused in the sum of $1,000 with one surety for a period of two years under section 173A of the Criminal Procedure Code. After the sentence was passed, the accused decided to change his plea to one of guilty on the second charge which reads:

"That you between 15.12.71 and 1.9.72 at the Police College, Kuala Kubu Bahru, in the District of Ulu Selangor, in the State of Selangor, forged a certain document, to wit, a MCE certificate wherein the name and index number have been erased and substituted another name and index number with intent to commit fraud and that you have thereby committed an offence punishable under 465 of the Penal Code."

The plea of guilty was accepted and the accused was also bound over under section 173A of the Criminal Procedure Code on the same terms as in the first charge.

The Public Prosecutor now appeals against the said orders contending that the sentence passed on both the charges is inadequate.

In his grounds of judgment, the learned magistrate had this to say on sentence:

"After considering the accused's plea in mitigation, the probation report, his age, public policy and all the circumstances of the case I bound over the accused in the sum of $1.000 with one surety for a period of 2 years under section 173A of the Criminal Procedure Code on each of the charges."

Towards the end of his judgment, he also said:

"In passing the sentence I did, I was greatly influenced by the accused's change of plea in the course of the trial. He repented for what he had done. He was a first offender. The accused did not appear to me as one criminally inclined and therefore I was of the view he should be given an opportunity to lead an honest and crime free life. I was also of the view the accused would certainly be dismissed from the Police Force for the offences which he had committed. I think the accused's imminent loss of job is in itself a sufficient punishment and lesson to him. After considering all the circumstances carefully, I was of the view a term of imprisonment was not a suitable sentence."

In this appeal, the learned Public Prosecutor concedes that the lower court was right in considering that a term of imprisonment was not a suitable sentence. With that I entirely agree having regard to the circumstances of the case, particularly the fact that the accused was a first offender. The main question to be determined in this appeal is whether the present case falls squarely and fairly within the terms of section 173A(ii)(b) of the Criminal Procedure Code. In my view, the learned magistrate failed to consider sufficiently the serious nature of the offence committed and the deliberate manner in which the crime had been perpetrated. Where the offence committed is not of a trivial nature and it is committed with such degree of deliberateness, a case can rarely come within the ambit of this section. In assessing sentence, a proper balance should be struck between public interest and the interest of the accused. In the present case, it is apparent from the grounds of judgment that the learned magistrate was too preoccupied with the interest of the accused whilst giving no adequate consideration to public interest. The object of punishment is not only to punish the offender but also to deter others. Forging a Malaysia Certificate of Education and using such forged document as genuine should not be considered lightly and the public interest would not be served by discharging the offender conditionally on his entering into a bond of good behaviour with or without sureties.

Having regard to all the circumstances of this case, I am of the view that the sentence passed is manifestly inadequate. The appeal against sentence is accordingly allowed. The order under section 173A of the Criminal Procedure Code is set aside on both counts. I order that a conviction be recorded on both the charges and the sentence should be enhanced to a fine of $500 in default six months' imprisonment on the first charge, and a fine of $250 in default three months' imprisonment on the second charge. If the fines are not paid, the terms of imprisonment should run concurrently.

Appeal allowed.

L.Y.S. v. DIRECTOR-GENERAL OF INLAND REVENUE

[A.C.J. (Gill F.J.) December 6, 1973]

[Kuala Lumpur — Originating Motion No. 76 of 1972]

Income Tax — Sums withdrawn from provident fund — Approval of provident fund revoked by Director-General of Inland Revenue — Payment to taxpayer after revocation of approval — Whether sum received is a "lump sum by way of gratuity, deferred pay or otherwise" — Ejusdem generis rule — Income Tax Act, 1967, s. 25(4) and Schedule 9, para. 39.

In this case the appellant had received the sum of $44,906.32 being the total contribution paid into the Kuala Lumpur Municipal Provident Fund by his employers, the Kuala Lumpur Municipality, during the period of his employment with them. The Kuala Lumpur Municipal Provident Fund was an approved fund under the Income Tax Ordinance 1947 and continued to be so under the Income Tax Act, 1967 until the approval was revoked by the Director-General of Inland Revenue on June 24, 1968 with effect from January 1, 1968. The provident fund moneys were paid to the appellant on February 13, 1970. The appellant was assessed to income tax on his income including the sum of $44,906.32 and he appealed. On the appeal, the Special Commissioners decided that the appellant was liable to income tax on the sum of $44,906.32 but they decided that the appellant was entitled to the benefit of proviso (a) to section 25(4) of the Income Tax Act, 1967 and that the sum should be treated as accruing and receivable evenly over the period of the appellant's employment. The appellant appealed against this decision and there was a cross-appeal by the Director-General of Inland Revenue.

Held: (1) as the amount of $44,906.32 was received by the appellant after the revocation of the approval of the provident fund, it was income received from an unapproved fund and therefore liable to tax;

(2) the Special Commissioners were right in holding that the word "otherwise" in proviso (a) to section 25(4) of the Income Tax Act, 1967, was wide enough to include the sum of $44,906.32 and therefore it should be treated as accruing and receivable evenly during the period of the appellant's employment.

ORIGINATING MOTION.

S. A. Raj for the appellant.

Rahmat bin Jamari (Senior Federal Counsel) for the respondent.

Gill F.J.: This appeal arises from a case stated by the Special Commissioners of Income Tax. The appellant was employed as a Valuation Officer by the Kuala Lumpur Municipality from August 1, 1952 to February 26, 1969. Under the terms of his service agreement, he and his employers contributed a monthly sum of money towards the Kuala Lumpur Municipal Provident Fund, there being no gratuity or pension scheme available to the employees of the said Municipality. On the date of his resignation from service the appellant became entitled to receive a sum of $44,906.32 which represented the total contribution paid into the said Provident Fund by his employers during the period of his employment with them. This sum was eventually paid over to the appellant on February 13, 1970.

Section 4(3) of the Income Tax Ordinance, 1947 provided as follows:

"The Comptroller-General may, subject to such conditions as he may think fit to impose, approve any pension or provident fund or society for the purposes of this Ordinance, and may, without prejudice to the exercise of any power in that behalf conferred on him by any condition so imposed, at any time withdraw any approval given under this Ordinance before Malaysia Day in respect of any such fund or society."

Under the above-mentioned powers conferred upon him, the Comptroller-General of Inland Revenue (the predecessor in title of the respondent) on July 8, 1954 approved the Kuala Lumpur Municipal Provident Fund for the purposes of the said Ordinance. Section 13(1)(j) of the Ordinance provided that "there shall be exempt from tax sums withdrawn by individuals on retirement from any approved pension or provident fund or society". The approval given under the Ordinance in respect of the said Provident Fund was not withdrawn before Malaysia Day.

The Income Tax Ordinance, 1947 was repealed by the Income Tax Act, 1967 with effect from 1st January, 1968. Paragraph 39 of Schedule 9 to the Act provides as follows:

"Where approval has been given for the purposes of any of the repealed laws to a retirement scheme or to a pension or provident fund or society, the approval, if it was still effective on 31st December, 1967, shall be deemed to have been given (subject to any conditions effective on that date) under section 150."

Section 150 of the Act says that "the Director-General may, subject to such conditions as he may think fit to impose, approve any pension or provident fund, scheme or society for the purposes of this Act". Section 148 of the Act empowers him to vary or revoke any such approval or direction retrospectively or otherwise. By virtue of such powers conferred upon him the Director-General on June 24, 1968 revoked with effect from 1st January, 1968 the approval granted to the Kuala Lumpur Municipal Provident Fund on 8th July, 1954.

By a notice of assessment issued by the respondent dated 17th May, 1971 the appellant was assessed to income tax for the year of assessment 1970 based on his income which included the said sum of $44,906.32. The appellant, being dissatisfied with the inclusion of this sum in his assessable income, appealed to the Special Commissioners against the said assessment.

It was contended for the appellant before the Special Commissioners that the revocation by the Director-General on 24th June, 1968 of the approval of the fund was *ultra vires* in that it was made to take effect rétrospectively. Alternatively, it was contended that since the revocation of the approval took effect from 1st January, 1968 the appellant was entitled to exemption from income tax in respect of his employers' contributions until 31st December, 1967. For the respondent it was contended that the appellant was not entitled to an exemption from income tax because the sum of $44,906.32 was due and payable to the appellant after the fund had ceased to be an approved fund for the purposes of the 1947 Ordinance and the 1967 Act.

In the event, the Special Commissioners decided that the revocation by the respondent was not in any way *ultra vires* or void because it was a perfectly legitimate exercise of the powers conferred upon him by section 148 of the Income Tax Act, 1967 and that consequent upon such revocation the fund ceased to be exempt for the purposes of both the 1947 Ordinance and the 1967 Act, so that the appellant was not entitled to any exemption from income tax in respect of the contributions made by his employers to that fund. But they went on further to decide that the appellant was entitled to the benefit of proviso (a) to section 25(4) of the Income Tax Act, 1967. In the result, the Special Commissioners decided that the sum of $44,906.32 was assessable to income tax under section 4(b) of the Income Tax Act, 1967 but that the said sum be treated for income tax under proviso (a) to section 25(4) of the Act and ordered the notice of assessment dated 17th May, 1971 to be amended accordingly. From that order the appellant has appealed to this court.

By way of recapitulation of facts of the case stated, it is to be observed that the provident fund which is the subject matter of this appeal could be exempted from tax under the Income Tax Ordinance, 1947. It was so exempted by section 13(1)(j) of the Ordinance on the Comptroller-General declaring it as an approved fund for the purposes of the Ordinance under section 4(3) of the Ordinance. This exemption was given on July 8, 1954. On June 24, 1968, the Director-General by virtue of the powers conferred on him by section 148 of the Income Tax Act, 1967 revoked the exemption with effect from January 1, 1968, the date on which the Act came into force.

It is clear that the appellant enjoyed the exemption as a matter of right until it was withdrawn, but it is equally clear that no such exemption existed on the date on which the money from the provident fund became payable to him. It is argued on behalf of the appellant that the revocation of the exemption by the 1967 Act could not revoke the exemption granted by the 1947 Ordinance, although it is conceded that the exemption granted under the 1947 Ordinance must be deemed to be an exemption under section 150 of the 1967 Act by reason of the transitional and saving provisions contained in paragraph 39 of Schedule 9

to the Act. It is further submitted that since the revocation was with effect from January 1, 1968 such revocation could not affect the contributions which had been made into the fund by the appellant's employers prior to that date. In other words, it is argued that the revocation can only apply to contributions made after January 1, 1968, from which it must follow that only the contributions made after that date became liable to income tax. The argument then proceeds as follows. The Director-General of Inland Revenue, having chosen to revoke the exemption with effect from January 1, 1968 cannot now say that the contributions made prior to that revocation are liable to income tax. It was perfectly within his powers under section 148 of the Act to have withdrawn the exemption from an earlier date. Having chosen January 1, 1968 as the date of revocation, he cannot take away the rights which had accrued to the appellant before that date as a tax statute should be construed strictly.

The weakness of the arguments advanced on behalf of the appellant lies in the fact that they overlook the crucial question as to the date on which the money in the provident fund became payable to the appellant. To my mind the material date for the purpose of exemption under the Ordinance was the date on which the money was withdrawn on retirement from the provident fund. No question of exemption under the 1947 Ordinance arose because the appellant had not retired from the fund before the Ordinance was repealed. Under the Ordinance the Comptroller-General was empowered to withdraw the approval before Malaysia Day. The approval not having been withdrawn by that day, it continued in force and was deemed to be an exemption under section 150 of the 1967 Act when it came into force on January 1, 1968. In other words, the exemption was still there when the Act came into force. Section 148 of the Act, however, empowered the Director-General to revoke the exemption retrospectively, which he did on June 24, 1968 with effect from the same date as the date of the coming into force of the Act. As the Special Commissioners have stated, this was a perfectly legitimate exercise of the powers conferred upon the Director-General. The power to revoke the exemption was there in the Ordinance, although it was limited up to a certain date, and the same power was continued under the Act. I do not see how it can be argued that the appellant had acquired any right under the Constitution by virtue of the exemption under the Ordinance. I also cannot see how the revocation of the exemption by the Director-General can be said to be *ultra vires* the provisions of the 1967 Act.

Section 13(1)(d) of the Act provides that

"gross income of an employee in respect of gains or profits from an employment includes so much of any amount (other than a pension, an annuity or periodical payment falling under section 4(e)) *received* by the employee, whether before or after his employment ceases, from a pension or provident fund, scheme or society not approved for the purpose of this Act as would not have been so received if his employer had not made contributions in respect of the employee to the fund, scheme or society or its trustee".

Section 4 of the Act deals with classes of income on which tax is chargeable, and subsection (e) speaks of "pensions, annuities or other periodical payments not falling under any of the foregoing paragraphs".

It is to be observed that section 13(1)(d) of the Act speaks of the amount "received by the employee". The question therefore is, when was the amount received? If it was received after the revocation of the exemption, then it is income received from an unapproved fund and therefore liable to tax. Even though the contributions by the employer were made before the exemption was revoked, they did not become payable to the appellant until his resignation from service with the Municipality. The fact that the fund was an approved fund before January 1, 1968 is not material because the amount in the fund could not be considered as income until the appellant resigned from the fund, which was well after the date of revocation of the exemption. I must therefore hold that the Special Commissioners were right in their decision that the sum of $44,906.32 received by the appellant is assessable to income tax under section 4(b) of the Income Tax Act, 1967.

The only other question for determination is whether the Special Commissioners were right in deciding that the said sum of $44,906.32 should be treated for income tax under proviso (a) to section 25(4) of the Act. This question arises on a cross-appeal by the respondent against that part of their decision.

Section 25 of the Act deals with the basis period to which gross income from employment should be related. Section 25(1) provides that where gross income from an employment is not receivable in respect of any particular period and first becomes receivable in the relevant year, it shall when received, be treated as gross income of the relevant person for the relevant period. Section 25(4) provides that where gross income from an employment is receivable in respect of a period (referred to as the overlapping period) which overlaps the relevant period, that gross income when received shall be apportioned between the part of the overlapping period which overlaps the relevant period and the remaining part or parts of the overlapping period and so much of that gross income as is apportioned to the overlapping part of the overlapping period shall be treated as gross income of the relevant person from the employment for the relevant period.

Proviso (a) to section 25(4) of the Act provides that where the employment of a person ceases in the basis period for a year of assessment and, at or about the time of such cessation, gross income from the employment becomes receivable by him as a lump sum by way of gratuity, deferred pay or otherwise, that sum notwithstanding the provisions of section 25(1) is to be treated as accruing and receivable evenly over the period of that person's employment; if, however, the period of employment commences more than four years before the commencement of the basis period in which the employment ceases the said sum is to be treated as accruing and receivable evenly over the basis period for the year of assessment in which the employment ceases, and the basis period for the four years of assessment immediately preceding that year.

The appellant's employment with the Municipality ceased in the basis period for the year of assessment 1970, when he resigned from the Municipality with effect from 26th February 1969, whereupon the sum

of $44,906.32 became receivable by him "as a lump sum by way of gratuity, deferred pay or otherwise" The Special Commissioners took the view that the word "otherwise" in the proviso was wide enough to include the sum of $44,906.32 whether or not that word was interpreted *ejusdem generis* with "gratuity, deferred pay" in the said proviso.

It is submitted on behalf of the respondent that the Special Commissioners' view is wrong for two reasons. First, it is said that section 25(4) does not apply to the facts of the case as there is no overlapping period. The withdrawal from a provident fund, it is contended, is not the same as payment of gratuity or a deferred pay, so that section 25(4) and proviso (a) thereto do not apply to the facts of the case. Secondly, it is contended that if the section does apply, the facts do not come within the proviso. Curiously enough counsel for the appellant submitted that section 25(4) is meant to cover payment in the nature of gratuities or retirement benefits where it is impossible to ascertain to which period the payments relate and that the words "gratuity, deferred pay or otherwise" cannot be interpreted *ejusdem generis* to include moneys paid out of a provident fund. It is next submitted that section 25(4) applies only if the gross income is not identifiable in respect of any particular period, and it is lastly submitted that the provident fund being in respect of a definite period, the amount of $44,906.32 should be spread out over the whole of that period for purpose of taxation.

The fallacy of the arguments put forward on behalf of the appellant lies in the fact that there is no provision in section 25 for a gratuity or deferred payment to be spread out over the whole of the period in respect of which it was paid. As regards the arguments advanced on behalf of the respondent, I do not think there can be any difference between withdrawal from a provident fund and payment out from a provident fund. It is common knowledge that a gratuity is more often that not related to a person's period of service, and so was the amount paid out of the provident fund in this particular case. After all, what was paid out to the appellant was the sum total of the contributions which his employers had paid into the provident fund. Whether payment is actual as in the case of a provident fund or notional as in the case of a gratuity which is worked out at the time of a person's retirement on the basis of his length of service, to my mind, makes no difference as regards the true nature of the payment. Bearing that in mind I am of the opinion that the Special Commissioners were right in coming to the conclusion that the word "otherwise" in proviso (a) was wide enough to include the sum of $44,906.32. I would go a step further and say that even under the *ejusdem generis* rule that sum should be treated as a payment in the nature of a gratuity.

I would therefore dismiss the appeal and the cross-appeal and confirm the deciding order made by the Special Commissioners. In all the circumstances of the case I will make no order as to costs.

Appeal and cross-appeal dismissed.

Solicitors: *Dato Clough Thuraisingham, Raj & Co.*

DIRECTOR-GENERAL OF INLAND REVENUE v. T.

[A.C.J. (Pawan Ahmad J.) December 11, 1973]
[Malacca — Originating Motion No. 9 of 1973]

Income Tax — Deduction — Deduction for child — Daughter who is married but whose marriage has been annulled for non-consummation — Whether daughter an "unmarried child" — Income Tax Act, 1967, s. 48(3)(a)(i).

In this case the respondent had claimed a deduction for his daughter, who was receiving full-time instruction for a Ph.D. degree in England. She had been married. but the marriage had been annulled on the application of her husband on the ground of her wilful refusal to consummate the marriage. The Director-General of Inland Revenue disallowed the claim for a deduction but on appeal to the Special Commissioners, it was held that the respondent was entitled to the claim for deduction as the daughter had reverted to the status of an unmarried daughter consequent upon the annulment of her marriage. The Director-General of Inland Revenue appealed to the High Court.

Held: the decree of nullity in this case did not have the effect of reverting the daughter to the position of an "unmarried child" for the purpose of section 48 of the Income Tax Act, 1967 and therefore the respondent was not entitled to the deduction which he claimed.

Cases referred to:-

(1) *Re Sergeant* 26 Ch. D. 575.
(2) *Dalrymple* v. *Hall* (1880-1881) 16 Ch. D. 715.
(3) *Dodworth* v. *Dale* [1936] 2 All E.R. 440.
(4) *Re Wombwell's Settlement* [1922] 2 Ch. 298.

ORIGINATING MOTION.

Mohamed bin Mohamed Said (Federal Counsel) for the appellant.

Respondent in person.

Pawan Ahmad J.: This is an appeal by the Director-General of Inland Revenue by way of Case Stated from a deciding order of the Special Commissioners of Income Tax.

The present respondent had appealed to the Special Commissioners of Income Tax in respect of his assessment of Income Tax for the year of assessment 1972 as contained in the Notice of Assessment dated 26 August 1972.

The question for the determination by the Special Commissioners was whether in the ascertainment of his chargeable income for the year of assessment 1972, the respondent was entitled to a deduction in respect of his daughter named P. (born on 18 May 1948) under section 48(3)(a)(i) of the Income Tax Act, 1967.

The Special Commissioners of Income Tax found as a fact that P. (f) is the eldest of the three children of the respondent — that she was married to one K. at Kuala Lumpur on 10 August 1966 — that she separated from her husband two months after marriage and that on the petition of her husband the High Court at Kuala Lumpur in Divorce Petition No. 22 of 1971 on 4 October 1971 pronounced and declared the marriage "to have been and to be absolutely null and void to all intents and purposes in the law whatsoever, by reason of the wilful refusal of the respondent to consummate the marriage".

The Special Commissioners of Income Tax also found that the respondent has supported P. before and after the annulment of marriage and that she is at present receiving fulltime instruction for a Ph.D. De-